

**EDMUND G. BROWN JR.**  
**Attorney General**

**State of California**  
**DEPARTMENT OF JUSTICE**



1300 I STREET, SUITE 125  
P.O. BOX 944255  
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555  
Telephone: (916) 323-9259  
Facsimile: (916) 327-2319  
E-Mail: Dan.Siegel@doj.ca.gov

September 10, 2008

COMMISSIONERS  
Delta Protection Commission

RE: Commission's Regulations Governing Appeals

Dear Commissioners:

At your meeting on November 29, 2007, you reviewed draft amendments to the Commission's regulations addressing a statutory change that now allows the Commission to initiate an appeal on its own. As the result of Commission feedback, we revised the draft and presented updated regulations to you on January 24, 2008. At that meeting, you reviewed and approved the revisions, and directed staff to continue the formal process for adopting the changes. Copies of my two letters describing the initial draft amendments and subsequent revisions are attached.

Except for clerical changes, the attached regulations (dated 7/22/08) are identical to those that you approved on January 24, 2008. They are being presented to you this second time as part of the formal process for adopting state regulations under California's Administrative Procedure Act (Gov't. Code §§ 11340 et seq.). At your meeting on September 25, 2008, you will be conducting a public hearing to receive any written and oral comments concerning the amendments. Following that hearing, you can either approve the proposed amendments, or direct staff to bring an altered proposal back to the Commission at a future meeting.

If you decide to approve the proposed amendments, we suggest the following motion:

I move that the Commission adopt the regulatory amendments dated 7/22/08, and that the Executive Director be authorized to make any grammatical or other nonsubstantial changes needed to meet requirements of the Administrative Procedure Act.

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Please note that Matt Campbell of our office will be available at the Commission's meeting to discuss this matter.

Sincerely,

[original signed by]

DANIEL L. SIEGEL

Supervising Deputy Attorney General

For EDMUND G. BROWN JR.  
Attorney General

Attachments:

Letter from Daniel L. Siegel to the Commission dated November 15, 2007

Letter from Daniel L. Siegel to the Commission dated January 11, 2008

Draft amended regulations (dated 7/22/08)



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E-Mail: Dan.Siegel@doj.ca.gov

November 15, 2007

COMMISSIONERS  
Delta Protection Commission

RE: Commission's Regulations Governing Appeals

Dear Commissioners:

Although for many years only aggrieved persons could appeal certain local actions to the Commission, the Delta Protection Act (Public Res. Code §§ 29700, et seq.) now allows the Commission to initiate an appeal on its own. Our office has therefore drafted suggested amendments to the Commission's current regulations to address this alternative means of commencing an appeal. We have also identified a potential problem concerning the timing of the aggrieved party hearing, and are therefore providing you with a possible amendment regarding that issue.

At this point, we are giving you the attached draft amendments—as well as an illustrative time line chart—to obtain your initial feedback. After making appropriate changes, we will then work with Executive Director Linda Fiack on the formal steps needed to adopt amended regulations. Those steps will include additional opportunities for the public to comment on the proposed changes, and for the Commission to further alter the draft amendments.

**Prior Law.** Before the new provision became effective on January 1, 2007, the Delta Protection Act provided that an appeal could be filed by an aggrieved party. (Public Res. Code § 29770, subd. (a).) The Act did not, however, contain any language indicating whether or not a Commissioner could be considered an aggrieved party and therefore file an appeal. In addition, it did not allow the Commission itself to initiate an appeal. Finally, the Commission's hearing generally had to be held "within 60 days from the date of the filing of the appeal." (*Ibid.*)

**Current Law.** The aggrieved person language has been maintained. The Act has added a new provision, however, allowing the Commission to initiate an appeal on its own. It provides, in part, that "the commission may decide by majority vote to review on appeal" local government actions "in the absence of an appeal by an aggrieved person." (Public Res. Code § 29770, subd. (b).) Moreover, in contrast to the 60 day deadline for hearing an appeal filed by an aggrieved person, the Act does not include any deadlines concerning appeals initiated by the Commission. It neither specifies a deadline for voting to initiate an appeal, nor a deadline to hold a hearing.

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**Existing Commission Regulations.** Current regulations provide that an aggrieved party must file an appeal within 10 days of a final local action. The Commission must then hold a hearing “at the first available Commission meeting after the filing of an appeal, but in no event more than 45 days thereafter.” (Cal. Code Regs., tit. 14, § 20008 subd. (a).) The hearing involves a two step process. First, the Commission determines by majority vote whether the appeal is within its jurisdiction and whether it raises an appealable issue. If the Commission determines that both conditions are met, then it takes the second step and addresses the merits at the “next available, regularly-scheduled meeting.” (Cal. Code Regs., tit. 14, § 20009.)

**Proposed Amendment Concerning Time to Hear Aggrieved Party Appeals.** The current regulatory language is ambiguous, but it could be interpreted as requiring the Commission to hear an aggrieved party appeal as little as one day after it is filed. If the Commission has a meeting scheduled the day after an appeal is filed, someone might argue that that is the “first available Commission meeting.” Although a better interpretation is that “available” means available given notice and other requirements, it would be best to eliminate this ambiguity. We therefore suggest that the regulations be altered to build in a minimum 15 day period between the filing of an appeal and the hearing. That would provide staff time to put the matter on the Commission’s meeting agenda, and to otherwise prepare for the hearing.

**Proposed New Provisions Concerning Appeals Initiated By Commission.** Any new provision will have to take into account the mechanics of bringing a matter to the Commission’s attention so that it can vote whether or not to initiate an appeal. To comply with open meeting law requirements (Gov. Code §§ 11120 et seq.), the matter cannot first be raised and voted on at a Commission meeting. Rather, it will need to be included in the Commission’s meeting agenda. We envision this occurring in one of two ways. First, the Executive Director will on her own identify a local decision as one that the Commission might want to consider appealing. She would then include it in the meeting agenda. Alternatively, an individual Commissioner might contact the Executive Director and ask that a matter be included in the meeting agenda.

With the above in mind, we drafted the proposed new provisions so that the meeting at which the Commission votes on whether to initiate an appeal will be the next scheduled meeting that occurs at least 25 days after the local government action in question. The 25 day period accounts for the 10 days needed to see if an aggrieved person files an appeal, then 15 additional days for staff to prepare a meeting notice and appropriate materials.

We also did not suggest a two step hearing process for Commission initiated appeals. Under our proposal, if the Commission votes to initiate an appeal it would then conduct a comprehensive hearing at its next regularly scheduled meeting. That hearing would address any jurisdictional and appealability issues that are raised, as well as the merits. There are two reasons for this comprehensive approach. First, the two step process is intended, in part, to weed out frivolous

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appeals. Where a majority of the Commission votes to initiate an appeal, however, it is extremely unlikely that the appeal will be frivolous. Second, a two step approach would mean that the process would generally take approximately two months longer than aggrieved party appeals. That is because appeals initiated by the Commission require the meeting at which it votes on whether to appeal, as well as the subsequent meeting to hear the appeal.

Please note that we will be available at the Commission's next meeting to discuss these suggested regulatory changes.

Sincerely,



DANIEL L. SIEGEL  
Supervising Deputy Attorney General

For EDMUND G. BROWN JR.  
Attorney General

# DELTA PROTECTION COMMISSION'S REGULATIONS CONCERNING APPEALS

## Title 14. Natural Resources Division 9. Delta Protection Commission Chapter 1. Commission Hearing Procedures

### PROPOSED ADDITIONS ARE IN RED ~~PROPOSED DELETIONS ARE STRICKEN~~

#### § 20000. Purpose

These regulations establish the procedures by which the Delta Protection Commission processes, considers and resolves appeals from local governmental decisions which are brought before the Commission under the provisions of Public Resources Code § 29770-29772.

Appeals may be initiated by an aggrieved person ("aggrieved person appeal"), or by the Commission on its own initiative ("appeal initiated by Commission").

#### § 20001. Time for Filing Aggrieved Person Appeal

A person aggrieved by any action taken by a local government which falls within the criteria established in Public Resources Code § 29970(a) may file an appeal with the Commission within 10 calendar days of the date on which the pertinent local government has taken final action concerning the matter being appealed. For purposes of this section, "final action" means a decision of the local government that is final and not subject to any further review by any member or decision-making body of that local government.

#### § 20002. Contents and Filing of Aggrieved Person Appeal

An appeal brought by an aggrieved person under these regulations shall be in writing and shall contain at least the following information:

- a) the name and address of the appellant;
- b) the name and address of the third party, if any, whose proposal is the subject of the appeal and the local government action being appealed;
- c) a description of the proposal or development that is the subject of the local government action being appealed;
- d) the identity of the local governmental body whose action is being appealed;
- e) the specific ground(s) for appeal; and
- f) a detailed statement of facts on which the appeal is based.

The appeal shall be considered "filed" with the Commission when the original letter from the appellant is received, determined by staff to contain all of the information listed above, and stamped "Filed" by the Commission with the date of filing indicated.

#### § 20003. Grounds for Aggrieved Person Appeal

The grounds for an aggrieved person's appeal of a local government action shall be limited to those specified in Public Resources Code § 29770(a), i.e., that such action is inconsistent with the Commission's Resource Management Plan, those portions of a local

government's general plan that implement the Resources Management Plan, or the Delta Protection Act.

#### **§ 20004. Commission Procedures Upon Receipt of **Aggrieved Person** Appeal**

Within five working days of receipt of an appeal, the executive director of the Commission shall:

- a) post a notice and brief description of the appeal in a conspicuous location in the Commission office;
- b) mail to the affected local government a copy of the same notice and brief description, together with a copy of the appeal document(s) filed with the Commission.
- c) mail to the affected third party, if any, identified in § 20002(b) above a copy of the notice and brief description, together with a copy of the appeal document(s) filed with the Commission; and
- d) mail copies of the notice and brief description to each member of the Commission.

#### **§ 20004.1 Appeal Initiated by Commission**

In the absence of an appeal by an aggrieved person, the Commission may decide by majority vote to review on appeal any action taken by a local government or other local agency in implementing the resource management plan, or otherwise taken pursuant to this division, for land located exclusively within the primary zone, if the Commission believes the action may be inconsistent with the resource management plan, or the Delta Protection Act. The Commission's vote shall take place no later than the first available, regularly-scheduled meeting that occurs at least 25 calendar days after the date on which the pertinent local government has taken final action concerning the matter. Where the Commission decides to review an action on appeal, the Commission shall proceed to hear the appeal at the Commission's next available, regularly-scheduled meeting.

#### **§ 20005. Effect of Appeal**

Upon ~~either receipt of a timely aggrieved person appeal, or the Commission's vote to initiate an appeal on its own,~~ the executive director shall notify the affected local government and the ~~party whose proposal is the subject of the appeal~~ ~~third party, if any, identified in § 20002(b) above~~ that the operation and effect of the local government's action has been stayed pending Commission action on the appeal as required by Public Resources Code § 29771. ~~Upon receipt of an appeal,~~ **Further,** the executive director shall request that the affected local agency make available for inspection and copying all relevant documents and materials used by the local government in its consideration of the action being appealed. This information shall include the names and addresses of all persons who submitted written comments or testified before the local government regarding the matter being appealed. If the Commission fails to obtain access to the documents and materials on a timely basis, the Commission shall commence a hearing on the appeal as provided in § 20008 ~~(for an aggrieved person appeal)~~ **or § 20009.1 (for an appeal initiated by the Commission)**, ~~below,~~ but shall leave the hearing open until all such relevant documents and materials are received and reviewed by the Commission.

**§ 20006. De Novo Review**

The Commission shall conduct a de novo review of the local government action being reviewed.

**§ 20007. Standard of Review**

The standard of Commission review of any appealable local government action shall be whether that action meets the requirements of Public Resources Code § 29770(a).

**§ 20008. Aggrieved Person Appeal: Hearing on Commission Jurisdiction/Appealable Issue**

a) The Commission's appellate review of an aggrieved person appeal shall be conducted in a hearing composed of two sequential phases, held in accordance with the provisions of Public Resources Code § 29770. At the first available Commission meeting occurring at least 15 days after the following filing of an appeal, but in no event more than 45 days thereafter after a filing, the Commission shall conduct an initial hearing and determine by majority vote whether the appeal;

- i) raises issues not within the Commission's jurisdiction; or
- ii) does not raise an appealable issue.

b) If the Commission finds either that the appeal raises issues outside the Commission's jurisdiction or that it fails to raise an appealable issue, the Commission shall dismiss the appeal. That dismissal constitutes final Commission action from which judicial review may be taken under Public Resources Code § 29772.

c) The Commission shall make the determination set forth in subsection (a) only after Commission staff has presented a recommendation, orally or in writing, on the questions presented. Any written staff recommendation is a public record which shall be made available for public inspection at least five working days prior to the hearing.

**§ 20009. Aggrieved Person Appeal: Hearing on Merits of Appeal**

Unless the Commission dismisses the aggrieved person appeal for the reasons set forth above, the Commission shall proceed to hear the appeal on its merits at the Commission's next available, regularly-scheduled meeting.

**§ 20009.1. Appeal Initiated by Commission: Hearing on Jurisdiction/Appealable Issue/Merits**

In an appeal initiated by the Commission, any interested person may assert, prior to or at the onset of the hearing, that the appeal:

- i) raises issues not within the Commission's jurisdiction; or
- ii) does not raise an appealable issue.

Where a party makes either assertion, the Commission shall hear and determine the issue prior to proceeding to the merits of the appeal. In such a case, if the Commission finds either that the appeal raises issues outside the Commission's jurisdiction or that it fails to raise an appealable issue, the Commission shall dismiss the appeal. That dismissal constitutes final Commission action from which judicial review may be taken under Public Resources Code § 29772.



Where no such assertion is made, or where the Commission determines that the appeal raises an appealable issue within its jurisdiction, the Commission shall hear the appeal on the merits.

#### **§ 20010. Evidence and Hearing Procedures**

a) Hearings conducted by the Commission under these regulations shall be conducted in a manner deemed most suitable to ensure fundamental fairness to all parties concerned, and with a view toward securing all relevant information and material necessary to render a decision without unreasonable delay.

b) Hearings need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a court proceeding. Unduly repetitious or irrelevant evidence shall be excluded upon order of the Commission or its chairperson.

c) Evidence before the Commission includes, but is not limited to, the record before the local government whose action is being appealed. Except in unusual circumstances, the record will not include a transcript of the local government proceedings unless provided by a party to the proceedings.

d) Any interested person may testify before the Commission regarding an appeal. Speakers' presentation shall be to the point and shall be as brief as possible. Visual and other materials may be used as appropriate. The Commission may establish reasonable time limits for presentation(s); such time limits shall be made known to all affected persons prior to any hearing. Where speakers use or submit to the Commission visual or other materials, such materials shall become part of the hearing record and shall be identified and maintained as such. Speakers may substitute reproductions of models or other large materials but shall agree to make the originals available upon request of the executive director.

e) Commissioners may ask questions of the appellant, the affected local government's representative(s), any affected third party(s) appearing at the hearing, staff or the Commission's legal counsel. Questioning of speakers at the hearing by other persons shall not be permitted except by permission of the Chairperson.

f) Interested persons may submit written comments concerning an appeal. Any such comments will be considered by the Commission if they are received by the Commission at or before the hearing on the appeal.

#### **§ 20011. Commission Decision on Merits of Appeal**

a) The Commission's determination on the merits of an appeal brought under Public Resources Code § 29770 shall be by majority vote.

b) The Commission's decision shall be deemed final upon the taking of the vote, unless the Commission directs that written findings be prepared for consideration by the Commission on a subsequent date. If such findings are prepared, the Commission action shall be deemed final upon the date the findings are adopted by the Commission.

c) Written Commission findings, if any, shall be prepared by staff and presented to the Commission for consideration at the next regularly-scheduled meeting following the Commission's vote on the merits of the appeal. The time for preparation of findings may be extended by the Chair in appropriate circumstances.

**§ 20012. Notification of Commission Action**

The Commission shall notify the local government, the appellant and the affected third party, if any, identified in § 20002(b) of each formal action taking by the Commission under § § 20008 and 20009. The notification shall be transmitted by the Executive Director within ten working days of the Commission's formal action.

**§ 20013. Ex Parte Contacts**

a) Decisions of the Commission on appeals heard under Public Resources Code § 29770 shall be based strictly on the evidence presented during the public hearing. The Commission shall not rely upon any communications, reports, staff memoranda, or other materials prepared in connection with a particular appeal unless those materials are made a part of the hearing record.

b) If commissioners receive written or oral communications from any person concerning a pending appeal outside the formal hearing process, they shall disclose, on the record and prior to a Commission vote on the appeal, both the existence and substance of the communications.

## APPEAL TIMELINES

### AGGRIEVED PERSON APPEAL

(Assumes appeal filed 10<sup>th</sup> day after local action)

DAY (Min.)	DAY (Max.)	EVENT
0		Final local government action
10		Final day to appeal
<del>10?</del> 25	55	Jurisdiction/appealability hearing: (a) 45 days after filing, or (b) next scheduled meeting <b>that occurs at least 15 days after filing</b> , whichever is sooner
<del>70?</del> 85*	115*	Merits hearing: Next scheduled meeting

### COMMISSION APPEAL

DAY (Min.)	DAY (Max.)	EVENT
0		Final local government action
10		Starts clock if no aggrieved person appeal filed
25	60*	Meeting to vote on whether to initiate appeal (needs to be on agenda): Next scheduled meeting that occurs at least 25 days after the local government action [Need to wait 10 days to see if person files appeal, then need 10 days notice of meeting. Added 5 more days to prepare notice.]
85*	120*	Jurisdiction/appealability (if raised); merits hearing: Next scheduled meeting

\* Assumes that the Commission regularly schedules meetings every other month. Also assumes that there are 30 days in every month. Actual number of days will vary slightly due to applicable months being longer or shorter than 30 days.

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**Attorney General**

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January 11, 2008

COMMISSIONERS  
Delta Protection Commission

RE: Commission's Regulations Governing Appeals

Dear Commissioners:

At the Commission's last meeting, you reviewed draft amendments to the Commission's regulations addressing a statutory change that now allows the Commission to initiate an appeal on its own. As the result of Commission feedback, we have made the following revisions to the attached draft:

- The draft now refers to "working days" rather than "calendar days" for all periods other than the longest (45) day period.
- We added language to section 20003 to make it clear that appeals are to be limited to the review of local government actions concerning lands located within the primary zone.
- We added language to section 20008(c) strongly encouraging staff to make written, as opposed to oral, recommendations concerning whether an appeal raises issues not within the Commission's jurisdiction or does not raise an appealable issue.
- We added section 20009.1, allowing an appellant to withdraw an appeal. We included provisions designed to ensure that, where an appellant withdraws an appeal, the Commission is not deprived of the right to initiate an appeal on its own.


COMMISSIONERS

January 11, 2008

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Please note that we will be available at the Commission's next meeting to discuss these suggested regulatory changes.

Sincerely,



DANIEL L. SIEGEL

Supervising Deputy Attorney General

For EDMUND G. BROWN JR.  
Attorney General

DELTA PROTECTION COMMISSION'S REGULATIONS CONCERNING APPEALS

Title 14. Natural Resources  
Division 9. Delta Protection Commission  
Chapter 1. Commission Hearing Procedures

PROPOSED ADDITIONS ARE IN RED  
~~PROPOSED DELETIONS ARE STRICKEN~~

§ 20000. Purpose

These regulations establish the procedures by which the Delta Protection Commission processes, considers and resolves appeals from local governmental decisions which are brought before the Commission under the provisions of Public Resources Code § § 29770-29772.

Appeals may be initiated by an aggrieved person ("aggrieved person appeal"), or by the Commission on its own initiative ("appeal initiated by Commission").

§ 20001. Time for **Filing Aggrieved Person Appeal**

A person aggrieved by any action taken by a local government which falls within the criteria established in Public Resources Code § 29970(a) may file an appeal with the Commission within 10 ~~calendar~~ **working** days of the date on which the pertinent local government has taken final action concerning the matter being appealed. For purposes of this section, "final action" means a decision of the local government that is final and not subject to any further review by any member or decision-making body of that local government.

§ 20002. Contents and Filing of **Aggrieved Person Appeal**

An appeal brought **by an aggrieved person** under these regulations shall be in writing and shall contain at least the following information:

- a) the name and address of the appellant;
- b) the name and address of the third party, if any, whose proposal is the subject of the appeal and the local government action being appealed;
- c) a description of the proposal or development that is the subject of the local government action being appealed;
- d) the identity of the local governmental body whose action is **being** appealed;
- e) the specific ground(s) for appeal; and
- f) a detailed statement of facts on which the appeal is based.

The appeal shall be considered "filed" with the Commission when the original letter from the appellant is received, determined by staff to contain all of the information listed above, and stamped "Filed" by the Commission with the date of filing indicated.

§ 20003. Grounds for **Aggrieved Person Appeal**

The grounds for **an aggrieved person's** appeal of a local government action shall be limited to those specified in Public Resources Code § 29770(a), i.e., that such action, **as to lands located exclusively within the primary zone**, is inconsistent with the Commission's Resource

Management Plan, those portions of a local government's general plan that implement the Resources Management Plan, or the Delta Protection Act.

#### **§ 20004. Commission Procedures Upon Receipt of **Aggrieved Person** Appeal**

Within five working days of receipt of an appeal, the executive director of the Commission shall:

- a) post a notice and brief description of the appeal in a conspicuous location in the Commission office;
- b) mail to the affected local government a copy of the same notice and brief description, together with a copy of the appeal document(s) filed with the Commission.
- c) mail to the affected third party, if any, identified in § 20002(b) above a copy of the notice and brief description, together with a copy of the appeal document(s) filed with the Commission; and
- d) mail copies of the notice and brief description to each member of the Commission.

#### **§ 20004.1 Appeal Initiated by Commission**

In the absence of an appeal by an aggrieved person, the Commission may decide by majority vote to review on appeal any action taken by a local government or other local agency in implementing the resource management plan, or otherwise taken pursuant to this division, for land located exclusively within the primary zone, if the Commission believes the action may be inconsistent with the resource management plan, or the Delta Protection Act. The Commission's vote shall take place no later than the first available, regularly-scheduled meeting that occurs at least 25 working days after the date on which the pertinent local government has taken final action concerning the matter. Where the Commission decides to review an action on appeal, the Commission shall proceed to hear the appeal at the Commission's next available, regularly-scheduled meeting.

#### **§ 20005. Effect of Appeal**

Upon ~~either~~ receipt of a timely **aggrieved person** appeal, ~~or the Commission's vote to initiate an appeal on its own,~~ the executive director shall notify the affected local government and the **party whose proposal is the subject of the appeal** ~~third party, if any, identified in § 20002(b) above~~ that the operation and effect of the local government's action has been stayed pending Commission action on the appeal as required by Public Resources Code § 29771. ~~Upon receipt of an appeal,~~ **Further,** the executive director shall request that the affected local agency make available for inspection and copying all relevant documents and materials used by the local government in its consideration of the action being appealed. This information shall include the names and addresses of all persons who submitted written comments or testified before the local government regarding the matter being appealed. If the Commission fails to obtain access to the documents and materials on a timely basis, the Commission shall commence a hearing on the appeal as provided in § 20008 **(for an aggrieved person appeal)** or § 20009.2 **(for an appeal initiated by the Commission)**, ~~below,~~ but shall leave the hearing open until all such relevant documents and materials are received and reviewed by the Commission.

#### **§ 20006. De Novo Review**

The Commission shall conduct a de novo review of the local government action being reviewed.

#### **§ 20007. Standard of Review**

The standard of Commission review of any appealable local government action shall be whether that action meets the requirements of Public Resources Code § 29770(a).

#### **§ 20008. Aggrieved Person Appeal: Hearing on Commission Jurisdiction/Appealable Issue**

a) The Commission's appellate review of an aggrieved person appeal shall be conducted in a hearing composed of two sequential phases, held in accordance with the provisions of Public Resources Code § 29770. At the first available Commission meeting occurring at least 15 working days after the following filing of an appeal, but in no event more than 45 calendar days thereafter after a filing, the Commission shall conduct an initial hearing and determine by majority vote whether the appeal;

- i) raises issues not within the Commission's jurisdiction; or
- ii) does not raise an appealable issue.

b) If the Commission finds either that the appeal raises issues outside the Commission's jurisdiction or that it fails to raise an appealable issue, the Commission shall dismiss the appeal. That dismissal constitutes final Commission action from which judicial review may be taken under Public Resources Code § 29772.

c) The Commission shall make the determination set forth in subsection (a) only after Commission staff has presented a recommendation, orally or in writing, on the questions presented. Staff are strongly encouraged, but not mandated, to make written as opposed to oral recommendations. Any written staff recommendation is a public record which shall be made available for public inspection at least five working days prior to the hearing.

#### **§ 20009. Aggrieved Person Appeal: Hearing on Merits of Appeal**

Unless the Commission dismisses the aggrieved person appeal for the reasons set forth above, the Commission shall proceed to hear the appeal on its merits at the Commission's next available, regularly-scheduled meeting.

#### **§ 20009.1. Withdrawal of Appeal**

a) At any time before the Commission commences the roll call for a final vote on an appeal, the appellant may withdraw the appeal. The withdrawal must be stated on the record at a hearing or filed with the Commission in writing.

b) Where the withdrawal is stated on the record at a hearing, it shall become effective immediately. In such an event, at that same Commission meeting the Commission may decide by majority vote to review on appeal any action related to the withdrawn appeal that the Commission could have reviewed absent that aggrieved party appeal. Where the Commission



decides to review an action on appeal, the Commission shall proceed to hear the appeal at the Commission's next available, regularly-scheduled meeting.

c) Where the withdrawal is filed in writing, it shall be effective at, but not before, the Commission's next available, regularly-scheduled meeting occurring at least 15 working days after the filing. At that meeting, the Commission may decide by majority vote to review on appeal any action related to the withdrawn appeal that the Commission could have reviewed absent that aggrieved party appeal. Where the Commission decides to review an action on appeal, the Commission shall proceed to hear the appeal at the Commission's next available, regularly-scheduled meeting.

#### **§ 20009.2. Appeal Initiated by Commission: Hearing on Jurisdiction/appealable Issue If Raised by an Interested Person; Hearing on Merits**

In an appeal initiated by the Commission, any interested person may assert, prior to or at the onset of the hearing, that the appeal:

- i) raises issues not within the Commission's jurisdiction; or
- ii) does not raise an appealable issue.

Where a party makes either assertion, the Commission shall hear and determine the issue prior to proceeding to the merits of the appeal. In such a case, if the Commission finds either that the appeal raises issues outside the Commission's jurisdiction or that it fails to raise an appealable issue, the Commission shall dismiss the appeal. That dismissal constitutes final Commission action from which judicial review may be taken under Public Resources Code § 29772.

Where no such assertion is made, or where the Commission determines that the appeal raises an appealable issue within its jurisdiction, the Commission shall hear the appeal on the merits.

#### **§ 20010. Evidence and Hearing Procedures**

a) Hearings conducted by the Commission under these regulations shall be conducted in a manner deemed most suitable to ensure fundamental fairness to all parties concerned, and with a view toward securing all relevant information and material necessary to render a decision without unreasonable delay.

b) Hearings need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a court proceeding. Unduly repetitious or irrelevant evidence shall be excluded upon order of the Commission or its chairperson.

c) Evidence before the Commission includes, but is not limited to, the record before the local government whose action is being appealed. Except in unusual circumstances, the record

will not include a transcript of the local government proceedings unless provided by a party to the proceedings.

d) Any interested person may testify before the Commission regarding an appeal. Speakers' presentation shall be to the point and shall be as brief as possible. Visual and other materials may be used as appropriate. The Commission may establish reasonable time limits for presentation(s); such time limits shall be made known to all affected persons prior to any hearing. Where speakers use or submit to the Commission visual or other materials, such materials shall become part of the hearing record and shall be identified and maintained as such. Speakers may substitute reproductions of models or other large materials but shall agree to make the originals available upon request of the executive director.

e) Commissioners may ask questions of the appellant, the affected local government's representative(s), any affected third party(s) appearing at the hearing, staff or the Commission's legal counsel. Questioning of speakers at the hearing by other persons shall not be permitted except by permission of the Chairperson.

f) Interested persons may submit written comments concerning an appeal. Any such comments will be considered by the Commission if they are received by the Commission at or before the hearing on the appeal.

#### **§ 20011. Commission Decision on Merits of Appeal**

a) The Commission's determination on the merits of an appeal brought under Public Resources Code § 29770 shall be by majority vote.

b) The Commission's decision shall be deemed final upon the taking of the vote, unless the Commission directs that written findings be prepared for consideration by the Commission on a subsequent date. If such findings are prepared, the Commission action shall be deemed final upon the date the findings are adopted by the Commission.

c) Written Commission findings, if any, shall be prepared by staff and presented to the Commission for consideration at the next regularly-scheduled meeting following the Commission's vote on the merits of the appeal. The time for preparation of findings may be extended by the Chair in appropriate circumstances.

#### **§ 20012. Notification of Commission Action**

The Commission shall notify the local government, the appellant and the affected third party, if any, identified in § 20002(b) of each formal action taking by the Commission under § 20008 and 20009. The notification shall be transmitted by the Executive Director within ten working days of the Commission's formal action.

#### **§ 20013. Ex Parte Contacts**

a) Decisions of the Commission on appeals heard under Public Resources Code § 29770 shall be based strictly on the evidence presented during the public hearing. The Commission shall not rely upon any communications, reports, staff memoranda, or other materials prepared in connection with a particular appeal unless those materials are made a part of the hearing record.

b) If commissioners receive written or oral communications from any person concerning a pending appeal outside the formal hearing process, they shall disclose, on the record and prior to a Commission vote on the appeal, both the existence and substance of the communications.

7/22/08

## DELTA PROTECTION COMMISSION'S REGULATIONS CONCERNING APPEALS

### Title 14. Natural Resources Division 9. Delta Protection Commission Chapter 1. Commission Hearing Procedures

#### PROPOSED ADDITIONS ARE IN RED ~~PROPOSED DELETIONS ARE STRICKEN~~

##### § 20000. Purpose

These regulations establish the procedures by which the Delta Protection Commission processes, considers and resolves appeals from local governmental decisions which are brought before the Commission under the provisions of Public Resources Code §§ 29770-29772.

Appeals may be initiated by an aggrieved person ("aggrieved person appeal"), or by the Commission on its own initiative ("appeal initiated by Commission").

##### § 20001. Time for **Filing Aggrieved Person Appeal**

A person aggrieved by any action taken by a local government which falls within the criteria established in Public Resources Code § 29970(a) may file an appeal with the Commission within 10 ~~calendar~~ **working** days of the date on which the pertinent local government has taken final action concerning the matter being appealed. For purposes of this section, "final action" means a decision of the local government that is final and not subject to any further review by any member or decision-making body of that local government.

##### § 20002. Contents and Filing of **Aggrieved Person Appeal**

An appeal brought **by an aggrieved person** under these regulations shall be in writing and shall contain at least the following information:

- a) the name and address of the appellant;
- b) the name and address of the third party, if any, whose proposal is the subject of the appeal and the local government action being appealed;
- c) a description of the proposal or development that is the subject of the local government action being appealed;
- d) the identity of the local governmental body whose action is being appealed;
- e) the specific ground(s) for appeal; and
- f) a detailed statement of facts on which the appeal is based.

The appeal shall be considered "filed" with the Commission when the original letter from the appellant is received, determined by staff to contain all of the information listed above, and stamped "Filed" by the Commission with the date of filing indicated.

##### § 20003. Grounds for **Aggrieved Person Appeal**

The grounds for **an aggrieved person's** appeal of a local government action shall be limited to those specified in Public Resources Code § 29770(a), i.e., that such action, **as to lands located exclusively within the primary zone**, is inconsistent with the Commission's Resource

Management Plan, those portions of a local government's general plan that implement the Resources Management Plan, or the Delta Protection Act.

#### **§ 20004. Commission Procedures Upon Receipt of Aggrieved Person Appeal**

Within five working days of receipt of an **aggrieved person** appeal, the executive director of the Commission shall:

- a) post a notice and brief description of the appeal in a conspicuous location in the Commission office;
- b) mail to the affected local government a copy of the same notice and brief description, together with a copy of the appeal document(s) filed with the Commission.
- c) mail to the affected third party, if any, identified in § 20002(b) above a copy of the notice and brief description, together with a copy of the appeal document(s) filed with the Commission; and
- d) mail copies of the notice and brief description to each member of the Commission.

#### **§ 20004.1 Appeal Initiated by Commission**

In the absence of an appeal by an aggrieved person, the Commission may decide by majority vote to review on appeal any action taken by a local government or other local agency in implementing the resource management plan, or otherwise taken pursuant to this division, for land located exclusively within the primary zone, if the Commission believes the action may be inconsistent with the resource management plan, or the Delta Protection Act. Except as provided in § 20009.1(b) and (c), below, the Commission's vote shall take place no later than the first available, regularly-scheduled meeting that occurs at least 25 working days after the date on which the pertinent local government has taken final action concerning the matter. Where the Commission decides to review an action on appeal, the Commission shall proceed to hear the appeal at the Commission's next available, regularly-scheduled meeting.

#### **§ 20005. Effect of Appeal**

Upon **either** receipt of a timely **aggrieved person** appeal, **or the Commission's vote to initiate an appeal on its own**, the executive director shall notify the affected local government and the **party whose proposal is the subject of the appeal** ~~third party, if any, identified in § 20002(b) above~~ that the operation and effect of the local government's action has been stayed pending Commission action on the appeal as required by Public Resources Code § 29771. ~~Upon receipt of an appeal;~~ **Further**, the executive director shall request that the affected local agency make available for inspection and copying all relevant documents and materials used by the local government in its consideration of the action being appealed. This information shall include the names and addresses of all persons who submitted written comments or testified before the local government regarding the matter being appealed. If the Commission fails to obtain access to the documents and materials on a timely basis, the Commission shall commence a hearing on the appeal as provided in § 20008 **(for an aggrieved person appeal)** or § 20009.2 **(for an appeal initiated by the Commission)**, ~~below~~, but shall leave the hearing open until all such relevant documents and materials are received and reviewed by the Commission.

#### **§ 20006. De Novo Review**

The Commission shall conduct a de novo review of the local government action being reviewed.

#### **§ 20007. Standard of Review**

The standard of Commission review of any appealable local government action shall be whether that action meets the requirements of Public Resources Code § 29770(a).

#### **§ 20008. Aggrieved Person Appeal: Hearing on Commission Jurisdiction/Appealable Issue**

a) The Commission's appellate review of an aggrieved person appeal shall be conducted in a hearing composed of two sequential phases, held in accordance with the provisions of Public Resources Code § 29770. At the first available Commission meeting occurring at least 15 working days after the following filing of an appeal, but in no event more than 45 60 calendar days thereafter after a filing, the Commission shall conduct an initial hearing and determine by majority vote whether the appeal;

- i) fails to raise an issue raises issues not within the Commission's jurisdiction; or
- ii) does not raise an appealable issue.

b) If the Commission finds either that the appeal fails to raise an issue within raises issues outside the Commission's jurisdiction or that it fails to raise an appealable issue, the Commission shall dismiss the appeal. That dismissal constitutes final Commission action from which judicial review may be taken under Public Resources Code § 29772.

c) The Commission shall make the determination set forth in subsection (a) only after Commission staff has presented a recommendation, orally or in writing, on the questions presented. Staff are strongly encouraged, but not mandated, to make written as opposed to oral recommendations. Any written staff recommendation is a public record which shall be made available for public inspection at least five working days prior to the hearing.

#### **§ 20009. Aggrieved Person Appeal: Hearing on Merits of Appeal**

Unless the Commission dismisses the aggrieved person appeal for the reasons set forth above, the Commission shall proceed to hear the appeal on its merits at the Commission's next available, regularly-scheduled meeting.

##### **§ 20009.1. Withdrawal of Appeal**

a) At any time before the Commission commences the roll call for a final vote on an appeal, the appellant may withdraw the appeal. The withdrawal must be stated on the record at a hearing or filed with the Commission in writing.

b) Where the withdrawal is stated on the record at a hearing, it shall become effective immediately. In such an event, at that same Commission meeting the Commission may decide by majority vote to review on appeal any action related to the withdrawn appeal that the Commission could have reviewed absent that aggrieved party appeal. Where the Commission decides to review an action on appeal, the Commission shall proceed to hear the appeal at the Commission's next available, regularly-scheduled meeting.

c) Where the withdrawal is filed in writing, it shall be effective at, but not before, the Commission's next available, regularly-scheduled meeting occurring at least 15 working days

after the filing. At that meeting, the Commission may decide by majority vote to review on appeal any action related to the withdrawn appeal that the Commission could have reviewed absent that aggrieved party appeal. Where the Commission decides to review an action on appeal, the Commission shall proceed to hear the appeal at the Commission's next available, regularly-scheduled meeting.

**§ 20009.2. Appeal Initiated by Commission: Hearing on Jurisdiction/Appealable Issue If Raised by an Interested Person; Hearing on Merits**

In an appeal initiated by the Commission, any interested person may assert, prior to or at the onset of the hearing, that the appeal:

- i) does not raise an issue within the Commission's jurisdiction; or
- ii) does not raise an appealable issue.

Where a party makes either assertion, the Commission shall hear and resolve the assertion prior to proceeding to the merits of the appeal. In such a case, if the Commission finds either that the appeal fails to raise an issue within the Commission's jurisdiction or that it fails to raise an appealable issue, the Commission shall dismiss the appeal. That dismissal constitutes final Commission action from which judicial review may be taken under Public Resources Code § 29772.

Where no such assertion is made, or where the Commission determines that the appeal raises an appealable issue within its jurisdiction, the Commission shall hear the appeal on the merits.

**§ 20010. Evidence and Hearing Procedures**

a) Hearings conducted by the Commission under these regulations shall be conducted in a manner deemed most suitable to ensure fundamental fairness to all parties concerned, and with a view toward securing all relevant information and material necessary to render a decision without unreasonable delay.

b) Hearings need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a court proceeding. Unduly repetitious or irrelevant evidence shall be excluded upon order of the Commission or its chairperson.

c) Evidence before the Commission includes, but is not limited to, the record before the local government whose action is being appealed. Except in unusual circumstances, the record will not include a transcript of the local government proceedings unless provided by a party to the proceedings.

d) Any interested person may testify before the Commission regarding an appeal. Speakers' presentation shall be to the point and shall be as brief as possible. Visual and other materials may be used as appropriate. The Commission may establish reasonable time limits for presentation(s); such time limits shall be made known to all affected persons prior to any hearing. Where speakers use or submit to the Commission visual or other materials, such materials shall become part of the hearing record and shall be identified and maintained as such.

Speakers may substitute reproductions of models or other large materials but shall agree to make the originals available upon request of the executive director.

e) Commissioners may ask questions of the appellant, the affected local government's representative(s), any affected third party(s) appearing at the hearing, staff or the Commission's legal counsel. Questioning of speakers at the hearing by other persons shall not be permitted except by permission of the Chairperson.

f) Interested persons may submit written comments concerning an appeal. Any such comments will be considered by the Commission if they are received by the Commission at or before the hearing on the appeal.

#### **§ 20011. Commission Decision on Merits of Appeal**

a) The Commission's determination on the merits of an appeal brought under Public Resources Code § 29770 shall be by majority vote.

b) The Commission's decision shall be deemed final upon the taking of the vote, unless the Commission directs that written findings be prepared for consideration by the Commission on a subsequent date. If such findings are prepared, the Commission action shall be deemed final upon the date the findings are adopted by the Commission.

c) Written Commission findings, if any, shall be prepared by staff and presented to the Commission for consideration at the next regularly-scheduled meeting following the Commission's vote on the merits of the appeal. The time for preparation of findings may be extended by the Chair in appropriate circumstances.

#### **§ 20012. Notification of Commission Action**

The Commission shall notify the local government, the appellant and the affected third party, if any, identified in § 20002(b) of each formal action taking by the Commission under §§ 20008 and 20009. The notification shall be transmitted by the Executive Director within ten working days of the Commission's formal action.

#### **§ 20013. Ex Parte Contacts**

a) Decisions of the Commission on appeals heard under Public Resources Code § 29770 shall be based strictly on the evidence presented during the public hearing. The Commission shall not rely upon any communications, reports, staff memoranda, or other materials prepared in connection with a particular appeal unless those materials are made a part of the hearing record.

b) If commissioners receive written or oral communications from any person concerning a pending appeal outside the formal hearing process, they shall disclose, on the record and prior to a Commission vote on the appeal, both the existence and substance of the communications.